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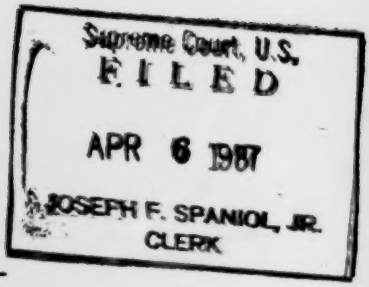

CASE NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

ANDREW J. MIRABOLE,
Petitioner,

vs.

THE FLORIDA BAR,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

JAMES G. MAHORNER, ESQ.
P.O. Box 682
Tallahassee, Florida 32302
Phone: (904) 656-3591

Counsel for Petitioner

QUESTIONS PRESENTED FOR REVIEW

I

Whether concealment of exculpatory evidence by the Bar prosecutor denies defendant constitutional due process in the quasi-criminal bar proceedings.

II

Whether the Bar's undertaking to control fees by punishing for an unreasonably high fee illegally interferes with determination by the market as found in the Bar undertaking to control fees by punishing for an unreasonably low fee.

III

Whether the discipline of one for stating his opinion that a fee is reasonable which opinion later is found by a judicial body to be erroneous violates constitutional guarantees of free speech.

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REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS

The opinion and judgment of the Supreme Court of Florida is docketed in that court as The Florida Bar, Complainant v. Andrew J. Mirabole, Respondent, No. 67,693, and is official reported in the Southern Reporter as The Florida Bar v. Mirabole, 498 So. 428.

The Report of the Referee which was affirmed by the Florida Supreme Court is included in the record in that Court but was not officially numbered.

REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS

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The Report of the Referee which was affirmed by the Florida Supreme Court is included in the record in that Court but was not officially numbered.

JURISDICTIONAL STATEMENT

The judgment sought to be reviewed was dated and entered on December 11, 1986, (A - 1). A Motion for Rehearing and Clarification was denied on the 5th day of January, 1987, (A - 6).

The jurisdiction of this Honorable Court is invoked pursuant to the specific provisions of 28 U.S.C. section 1257 (3).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Constitution of the United States

Article XIV, Section 1 (Fourteenth Amendment)

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the State wherein they reside. No State shall make or enforce a law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Florida Bar Rules of Professional Conduct

Rule 4-3.4 provides:

4-3.4. Fairness of opposing party and counsel. A lawyer shall not:

(a) . . . conceal a document or other material that the lawyer knows or reasonably should know is relevant to a pending. . . proceeding. (emphasis added)

STATEMENT OF THE CASE

Petitioner, Mirabole, was found guilty (A 1-2) of charging an excessive fee (non fraudulent). The written client-attorney contract (A-29-31) set the fee at $100.00 per hour for lawyer time and obligated Petitioner through himself and his employed lawyers to represent client Suncoast Service Center (owned by Rodriquez) in litigation initially solely involving collection of a $3,000.00 debt to client from debtor Hooper (a Florida lawyer) and which was drastically expanded by need to defend against debtor's counterclaim against client seeking punitive damages and damages for fraud and to defend against administrative undertakings of debtor seeking to remove client's ability to obtain bonding and future permits. After client rejected an offered compromise from debtor of 90% of debt the fee, which was then $1,600.00, progressed to $25,000 for hours that were relatively undisputed (though subjected to great complaint as to a small part of lawyer time being for delivery of papers, trips to depositions and other periods not involving pure legal endeavor).

The legal fee court claim against Petitioner by the client was compromised at $4,000 and dismissal of client's malpractice claim which was also equally subject to an argument of being excessive as to a bona fide claim that the lawyer bringing such claim testified while testifying for the Bar prosecution that he was glad it had been (TT 113).

Client recognized that the cause of the high attorney fees was the extreme retaliatory conduct of the debtor (a Florida lawyer) as evidenced by her only filing grievances against the debtor. This fact was purposely concealed by the Bar from Petitioner whose sole source of information that the Bar charges were retaliatory charges brought by the debtor, was the Bar. The concealed fact, evidenced by the motion to reopen the judgment and its attachment (A), was not discovered until the entry of the final Bar Disciplinary Order by the Florida Supreme Court (A 1-2).

REASONS FOR GRANTING THE WRIT

I

Whether concealment of exculpatory evidence by the Bar prosecutor denies defendant constitutional due process in the quasi-criminal bar proceedings.

The Florida Bar's concealment of evidence favorable to Petitioner denied him due process of law. This Court has recognized that bar disciplinary proceedings are quasi-criminal. See Re Ruffalo, 390 U.S. 544. The circumstances of Bar disciplinary proceedings clearly support that principle in that the professional is punished by loss of privilege for wrongful conduct in the same manner that an intoxicated driver is punished by loss of driving privilege for wrongful conduct.

This Court has held without modern exception that due process requires the prosecutor to disclose to the defense exculpatory evidence known to the prosector, which might reasonably change the outcome, so as to prevent society's punishment being inflicted because of concealment of favorable evidence. United States v. Bagley, 473 U.S. 667.

The concept of disclosure is imposed upon bar members by DR 4-3.4, Florida Bar Rules of Professional Conduct, dealing with the duty to disclose to the tribunal. The Bar, much like an evangelist who sins while preaching abstinance concealed exculpatory evidence and violated its own principles of candor in order to increase the possibilities of punishing Petitioner for charging a fee which it felt to be excessive even though Petitioner practiced complete openness with his client as to the hourly rate.

The Bar knew that skilled counsel employed by Petitioner would be substantially more persuasive if able to argue that the client's complaint was directed at the debtor-attorney because she, with the most knowledge of all the circumstances and acumen for business, had discerned that the size of the fees were caused by the obduracy of her opposing party and that Petitioner was without fault.

There could have further been made on Petitioner's behalf the argument that the bar proceedings against Petitioner were initiated by the debtor solely in retaliation for the proceedings against him.

It could further have been argued that when Petitioner and client separated because of the fee dispute that the new attorney could have collected attorney's fees from the debtor sufficient to make the client whole by arguing the principles of obduracy. Indeed, the skills of Petitioner's counsel below, which exceed the undersigned may have had stronger arguments had the secreted information been known.

As is shown by the strong dissent In Re Kutner, 399 NE 2d 963, and the Florida case of The Florida Bar v. Moriber, 314 So 2d 145, wherein it was held that the attorney would not be punished if he reduced his fee demonstrating that the question of punishing one attorney for nonfraudulent fees which other attorneys might find excessive is not without difficulty so that the secreting of exculpatory information that the client had found the fault to be in another, cannot be considered harmless. Indeed, in many ways, it can be compared to secreting a statement by a rape victim that her attacker was not the defendant.

It should be also noted that the cross examination of the bar witnesses by Petitioner's attorney has a comical aspect when read in light of possession of the secreted information. Clearly the effective confrontation of the witnesses in violation of the 6th amendment right to confrontation and furthered the deprivation.

II

Whether the Bar's undertaking to control fees by punishing for an unreasonably high fee illegally interferes with determination by the market as found in the Bar undertaking to control fees by punishing for an unreasonably low fee.

Until recent times neither the American Bar nor the Florida Bar punished excessive fees without fraud.

This Court in Goldfarb v. Virginia State Bar, 421 U.S. 773, found that a restriction on excessively "low" fees violated the Sherman Antitrust Act, and interfered with fair trade and the determination of price by the marketplace.

Clearly, a restriction on excessively "high" fees produces the same effect. Thus, if one cabinet maker be excessively skillful because he places substantial time in his work and charges $500 per cabinet while others less skillful, because of not having spent the time and study, or in their cabinets as did the first, and only charge $20 a cabinet, a price restriction of a maximum of $30 per cabinet would deprive the consumer who has a special need from fulfilling it.

Thus the client, as shown on page (TT 105-107) who was confronted by a skilled opponent who was locally known as being one of the most obdurate lawyers in the community and having the legal skills necessary to peak his obnoxiousness, needed the ability to seek a special product which would be rendered extinct if price fixing limited the hours to be expended in its creation.

A skilled cabinetmaker will produce only inferior cabinets if required to charge an inferior price. Justice Burger perceived these principles in stating the following in Goldfarb, supra:

> Petitioners clearly proved that the fee schedule fixed fees and thus deprived purchasers or customers of the advantages which they derive from free competition.

The principles above aserted are adopted in the dissent in In Re Kutner, 399 N.E. 2nd 963. Such dissent, among other arguments in support of no limit on non-fradulent fees except by a judicial determination in court states the following:

> I would suggest that it is not our function to delve into what is a reasonable fee in a given case precisely because no case is "standard." The negotiation of a fee should be left to the parties. A person may be willing to pay more for the services of a particular attorney at a particular time, when, however, under different circumstances, the attorneys' services would not be as valuable. In this connection the question may be asked whether the fee in this case would be excessive if the attorney involved were a nationally famous criminal lawyer?

III

Whether the discipline of one for stating his opinion that a fee is reasonable which opinion later is found by a judicial body to be erroneous violates constitutional guarantees of free speech.

The attorney's fee submitted to client by Petitioner was but an opinion as to what the client owed. It was not submitted as a legal opinion, but even had it been an erroneous legal opinion and so determined by a court it would not have subjected the attorney to sanctions. As in every legal argument the Court finds one of the two legal opinions to be erroneous.

Obviously, an attorney does not lose his freedom of speech by becoming attorney. Clearly, an attorney has a right to submit his opinion as to the amount owed without the restraint of making certain that his opinion comports with and is shared by others. The purpose of the freedom of speech clause is solely to protect opinions not widely shared, or shared by any. Opinions shared by the majority, being protected by a superior force, need no constitutional protection. Only an excessive fee opinion needs constitutional protection because it is not shared by the majority.

The bar can and should protect the public from fee opinions which, though not fraudulent, perhaps lack some candor. This protection can be achieved without

constitutional destruction of free speech which took place below.

It can be achieved by charging to an attorney the client's attorney's fee if the client successfully defends against the attorney's opinion; as this Court has said, applying the least infringment possible. Speiser v. Randall, 357 U.S. 513.

It can be protected by requiring the fee issue to be presented to a bar designated arbitration group consisting of two lay persons and one attorney. After all, the constitution permits this court, at the discretion of the executive branch, to be made up of only lay persons. Thus there is no constitutional prohibition against a judicial decision by a lay body.

The Florida Bar has instead chosen to raise the sabre against free speech instead of using the equally effective characteristics of the above suggested remedies.

The Florida Bar has chosen to not follow the path of least infringement. Furthermore, the Florida Bar in using the sabre has baited its trap by disguising the danger

through a rule that declines to say what is excessive or otherwise specify without ambiguity or vagueness the wrongful act.

The Florida Bar, rather than publish a maximum fee schedule, has undertaken to ensure its sabre will have the maximum victims in its trap by disguising its trap with the most ambiguous word possible, "excessive."

The Florida Bar, not wishing a jury of lay persons to make the decision as to whether the attorney's opinion as to his fee is correct, bars the attorney from developing and asserting for judicial and jury determination that legal issue unfavored by the bar.

It is comparable to a school system forbidding its students from asserting integration when segregation was the law of the land. The attorney is placed under a prior restraint from developing the legal position that a higher fee in a case involving an obdurate opposing party and attorney is not excessive.

Small wonder that the courts in Florida have not considered giving attorney's fees for obduracy because the Florida Bar has effectively squelched one issue by

requiring the non-obdurate attorney for his non-obdurate party to absorb the loss without the opportunity of challenging the loss in court and before a jury.

CONCLUSION

The Florida Supreme Court has rendered a decision which has so far departed from the accepted and usual course of judicial proceedings, and, by approving the bar referee's recommendations, sanctioned such departure by the Florida Bar as to deny this Petitioner of due process of law.

A substantial and important federal question being involved, the decision on review should be stayed pending a decision by the Supreme Court of Florida on the motion to reopen the judgment rendered by it and, if new proceedings comporting with due process are not accorded, the decision should be reversed and the case remanded with directions that such proceedings be had.

Respectfully submitted,

James G. Mahorner
Post Office Box 682
Tallahassee, Florida 32302
904/656-3591

Attorney for Petitioner

APPENDIX

INDEX TO APPENDIX

SUPREME COURT OF FLORIDA

No. 67,693

THE FLORIDA BAR, Complaintant,

vs.

ANDREW J. MIRABOLE, Respondent.

(December 11, 1986)

PER CURIAM.

The Florida Bar brought this disciplinary action against Andrew J. Mirabole, a member of the Florida Bar, for charging and attempting to collect a clearly excessive attorney's fee. This Court has jurisdiction pursuant to article V, section 15, Florida Constitution. After a hearing, the referee recommended that Mirabole be found guilty of violating disciplinary rule 2-106(A) (charging or collecting a clearly excessive fee) and that he be brought before the board of governors of the Florida Bar for a public reprimand. Although Mirabole disputes the referee's conclusions, they are supported by competent and substantial evidence. Mirabole billed his client over

$24,000 for representing her in her $3,000 mechanics' lien action. The bill was clearly excessive. Accordingly, we adopt the referee's findings and approve the recommended discipline.

Publication of this opinion in the Southern Reporter, coupled with Mirabole's appearance before the board of governors shall serve as the public reprimand. Judgment for costs in the amount of $1,638.80 is hereby entered against Mirabole, for which sum let execution issue.

It is so ordered.

MCDONALD, C.J., and BOYD, OVERTON, EHRLICH, SHAW and BARKETT, JJ., Concur
ADKINS, J., Dissents

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Original Proceeding - The Florida Bar

John F. Harkness, Jr., Executive Director and John T. Berry, Staff Counsel, Tallahassee, Florida; and Diane Victor Kuenzel, Bar Counsel, Tampa, Florida,

for Complaintant

Michael L. Kinney, Tampa, Florida; and Richard T. Earle, Jr. of Earle and Earle, St. Petersburg, Florida,

for Respondent

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complaintant,

vs.

ANDREW J. MIRABOLE,

Respondent.

_____/

CONFIDENTIAL
Case No. 67,693
TFT #13B84114

REFPORT OF REFEREE

I. Summary of Proceedings: Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein according to the article XI of the Integration Rule of The Florida Bar, a final hearing was held on January 9, 1986. The enclosing pleadings, orders, transcripts and exhibits are forwarded to The Supreme Court of Florida with this report, constitute the record in this case.

The following attorneys appeared as counsel for the parties:

For The Florida Bar DIANE VICTOR KUENZEL

For the Respondent MICHAEL L. KINNEY

II. Findings of Fact as to Each Item of Misconduct of Which the Respondent is Charged: After considering all the pleadings and evidence before me, I find the Respondent guilty of charging a clearly excessive fee, as evidenced by the guidelines as set out in DR 2-106(B).

III. Recommendation as to Whether or not the Respondent Should be Found Guilty: I recommend that the

Respondent be found guilty of the following violations of the Code of Professional Responsibility: DR 2-106(A).

IV. Recommendation as to Disciplinary Measures to be applied: I recommend that the Respondent be brought before The Florida Bar for a public reprimand.

V. Personal History and Past Disciplinary Record: After finding of guilt and prior to recommending discipline to be recommended pursuant to Rule 11.06(9) (a) (4), I considered the following personal history and prior disciplinary record of the respondent, to wit:

(1) Age: 44

(2) Date Admitted to Bar: 1969

(3) Past Disciplinary Record: None

(4) Mitigating Factors: No prior grievance or complaint in practice. Action of opposing counsel.

(5) Aggravating Factors: Respondent let the personalities between opposing attorneys overcome and outweigh the professional representation of his client.

VI. Statement of Costs and Manner in which Costs Should be Taxed:

I find the following costs were reasonably incurred by The Florida Bar. (Costs to date).

A.	Grievance Committee Level	$ 150.00
	Administrative Costs	615.50
	Court Reporter	
	Appearance fee (17/86)	(—.—)
	Transcript (6/17/86)	(—.—)
B.	Referee Level	150.00

Bar Counsel Travel	24.30
Witness Fees & Travel	69.00
Court Reporter	630.00
TOTAL COSTS:	$1,638.80

It is apparent that other costs have or may be incurred. It is recommended that all such costs and expenses together with the foregoing itemized costs be charged to the Respondent, and that interest at the statutory rate shall accrue and be payable beginning 30 days after the judgment in this case becomes final unless a waiver is granted by The Board of Governors of The Florida Bar.

Dated this 19th day of June, 1986.

/s/ JAMES S. PARKER
JAMES S. PARKER
Referee

Copies furnished to:

Michael L. Kinney, Attorney for Respondent
Diane Victor Kuenzel, Bar Counsel
John T. Berry, Staff Counsel

IN THE SUPREME COURT OF FLORIDA
MONDAY, JANUARY 5, 1987

THE FLORIDA BAR,	*	
	*	
Complaintant,	*	
	*	
v.	*	CASE NO. 67,693
	*	
ANDREW J. MIRABOLE,	*	
	*	
Respondent.	*	
	*	

* *

Upon consideration of the Motion for Rehearing and Clarification filed in the above cause by attorney for respondent, and reply thereto,

IT IS ORDERED that said Motion be and the same is hereby denied.

ADKINS, BOYD, OVERTON, EHRLICH, SHAW and BARKETT, JJ., concur
McDONALD, C.J., dissents

cc: Diane Victor Kuenzel, Esquire
John T. Berry, Esquire
Michael J. Kinney, Esquire

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complaintant, CONFIDENTIAL

v. FILE NO. 13B84114

ANDREW J. MIRABOLE,

Respondent.
_____/

COMPLAINT

The Florida Bar, complaintant, files this complaint against Andrew J. Mirabole, respondent, pursuant to Fla. Bar Integration Rule, article XI, as amended and alleges:

1. Respondent is, and at all times hereinafter mentioned was, a member of The Florida Bar subject to the jurisdiction and disciplinary rules of the Supreme Court of Florida.

2. On September 6, 1983, respondent was retained by Bonnie Rodriquez, owner of Suncoast Service Center, Inc., a small Tampa air conditioning company, to collect monies owed her under a contract for the installation of an air conditioning unit.

3. The individual who defaulted on the contract was Tampa attorney, J. B. Hooper, who had the unit installed in a house he owned as a real estate investment.

4. The total amount of the claim under the contract was $3,021.00 plus reasonable attorney's fees in the event of suit to enforce the contract.

5. In October, 1983, respondent filed a mechanic's lien on the property and filed a mechanic's lien foreclosure action against Mr. Hooper on behalf of Mrs. Rodriquez.

6. On January 18, 1984, respondent had Ms. Rodriquez sign a fee contract which specified that his fee was to be computed on an hourly basis, at a rate of $100.00 per hour. (Exhibit A).

7. During the next two weeks, Mrs. Rodriquez paid respondent approximately $1,600.00 in fees and costs, as per his request. At no time since the date of his employment did respondent provide Mrs. Rodriquez with a fee statement indicating the hourly work done on her case.

8. As of April 23, 1984, Mrs. Rodriquez paid respondent a total of $2,875.00, $1,500.00 to be applied as fees.

9. On April 23, 1984, respondent informed Mrs. Rodriquez that his total bill for fees and costs would amount to no more than $6,500.00.

10. However, as of April 23, 1984, he had still failed to provide her with a fee statement or any other breakdown of work done on her case.

11. Then on May 4, 1984, respondent forwarded Mrs. Rodriquez his first fee statement. On that date, he billed Mrs. Rodriquez for approximately $24,000 for legal services and costs, in addition to the amount that she had paid. (Exhibit B). On that date, the suit against Mr. Hooper was still pending.

12. Respondent billed Mrs. Rodriquex for time spent on the case by the respondent's salaried employee, Attorney Ronald Napolitano, at a rate of $100.00 per hour. Mr. Napolitano's hours totaled 109.1 for his work on the case.

13. Mr. Napolitano stated that he is paid a fixed salary by respondent in addition to a percentage of fees that are generated by clients that he has personally retained and that he bills those clients at a rate of $75.00 per hour.

14. He further stated that he receives no compensation from work that he performs on respondent's cases, that he has no knowledge of the fee statement compiled by respondent and that he had nothing to do with setting the $100.00 per hour rate for his services.

15. Respondent billed Mrs. Rodriquez for several hours of research by Mr. Napolitano in the area of mechanics lien law and other areas of law at $100.00 per hour.

16. Mrs. Rodriquez was billed $100.00 per hour for time spent by Mr. Napolitano to deliver certain papers to the courthouse, as well as several other errands, and "trips downtown."

17. Respondent himself logged 132.6 hours on Mrs. Rodriquez' mechanics lien case although the matter was neither settled nor taken to trial.

18. Respondent withdrew his representation from Mrs. Rodriquez' case on or about May 25, 1984, while the case still pending.

19. The respondent subsequently sued Mrs. Rodroquez in circuit court (Case No. 84-8298, Div C) for the amount claimed in his bill ($23,966.98). (Exhibit C).

20. Respondent's charging of a $23,966.98 attorney fee to represent a client in a $3,021.98 mechanic's lien action is in excess of reasonable fee when considering the experience, reputation and ability of Mr. Napolitano in the area of mechanic's lien law, the fee customarily charged in the locality for similar services, the novelty and difficulty of the questions involved, the amount involved, and the results obtained.

21. By reason of the foregoing, the respondent has violated The Florida Bar Code of Professional Responsibility, Disciplinary Rule 2-106(A) (charging and attempting to collect a clearly excessive attorney's fee).

WHEREFORE, The Florida Bar respectfully prays that the respondent be appropriately disciplined in

accordance with Florida Bar Integration Rule, article XI, as amended.

/s/ THOMAS J. ROEHN
THOMAS J. ROEHN
Chairman
13th Judicial Circuit
Grievance Committee B
Post Office Box 3433
Tampa, Florida 33601
(813) 229-3321

/s/ DIANE VICTOR KUENZEL
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IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complaintant, CONFIDENTIAL
FILE NO. 13B84114

vs.

ANDREW J. MIRABOLE,

Respondent.
_____/

ANSWER AND DEFENSES

COMES NOW, the Respondent, ANDREW J. MIRABOLE, by his undersigned attorney, and files this his Answer to the complaint and states as follows:

FIRST DEFENSE

In answering the numbered paragraphs thereof the Respondent states:

1. Admitted that he is a member, and has been a member of the Florida Bar during all times mentioned in this complaint.

2. Admitted only to the extent that he was retained by Bonnie Rodriquez, as President of Suncoast Service Center, Inc., to collect monies for the installation of air conditioning unit.

3. Admitted that Suncoast sued J. B. Hooper; the remaining allegations are denied in that there was a co-defendant, Arthur T. Jones.

4. Admitted in part as to the claim under contract. However, denied since the complaint also included court costs and furthermore, defendants, Hooper and Jones, filed a counterclaim for compensatory and punitive damages, attorney fees and costs against Suncoast and demanded a jury trial.

5. Admittd to the extent that Suncoast sued for a mechanic's lien foreclosure action, the remaining allegations are denied since the action was against Hooper and Jones and the Plaintiff was Suncoast Service Center and not Bonnie Rodriquez.

6. Admitted only to the extent that Bonnie Rodriquez signed a contract on behalf of Suncoast Service Center, Inc.

7. Denied in that the client did not pay $1,600.00 in fees and costs within two weeks. Denied in that the written statement and letter was sent to the client on May 4, 1984, and within three and one-half months of the dated contract.

8. Denied for the reason that the client paid $2,725.00 as a retainer fee; the remaining allegations are denied.

9. Denied on the grounds that the Respondent sought to compromise the client's bill in order to achieve a settlement of this case prior to the second scheduled trial, as per the Judge's instructions.

10. Denied for the reason that Respondent complied with his obligations as per the written attorney/client contract. Client was provided with a statement on May 4, 1984, client attended most of the hearings and depositions and other proceedings and was orally informed of the escalation of the fees based on time involved and services performed during the course of this legal action.

11. Admitted that the Respondent forwarded a statement to the client. The documents speak for themselves. Denied in part because the client would have been given credit for all retainer fees paid. Admitted that at the time the lawsuit against Hooper and Jones was still pending.

12. Admitted in part, in that, associate attorney was billed at $100.00 per hour for his total hours in the case. Admitted that Mr. Napolitano's hours were 109.1 for his work on the case.

13. Admitted in part that the associate counsel, Mr. Napolitano, has a fixed salary in addition to a percentage of the fees that he generates on behalf of his own clients. The remaining allegations are denied in that his fees range in accordance with the criminal semi-indigency program, the court appointed counsel program, and the $75.00 he billed was for either semi-indigent or a reduced fee in order to build a clientele. At no time did the associate assert that $75.00 was based upon a reasonable hourly rate for his services.

14. Admitted that Mr. Napolitano receives no compensation for the work he performed on the Respondent's cases and has nothing to do with the billing except that he compiles his hours independently and therefore has no pecuniary interest in the number of hours for which he bills. The remaining allegations are denied.

15. Denied; the Respondent billed Suncoast. Admits that client was billed at $100.00 per hour.

16. The Respondent is without knowledge as to certain papers, other errands and trips downtown but admits the Respondent and/or the associate had to represent the client before the appropriate representatives of the mechanical inspection bureau and other building departments of the City of Tampa and to delivery emergency motions and orders to the Court in connection with this cause.

17. Admitted that the Respondent logged 132.6 hours although the matter was set for trial on three occasions and continued or removed from the trial docket over Respondent's objections.

18. Admitted to the extent that the Respondent withdrew as counsel for Suncoast as per authorization in paragrah 6 of the client/attorney's fee contract in which client failed to either sign a stipulation or obtain substitute counsel. The Court entered an order authorizing withdrawal on June 4, 1984 after prior notice and hearing.

19. Denied, in that, the Respondent sued Suncoast Service Center, Inc., not Bonnie Rodriquez. Admitted as to the case number and division and to the copy of the complaint.

20. Denied for the reason that the Petitioner failed to consider the client's exposure on the amended counterclaim of Hooper and Jones, which is attached and incorporated herein by reference. Petitioner fails to consider the services of the attorney in representing the client on the matter of permits and inspection before the mechanical bureau and other agencies of the City of Tampa Building Department. That these services were necessitated because of the instigation and complaint of J. B. Hooper against Suncoast with the various departments and agencies who issue permits and provide inspection of the work done by Suncoast Service Center, Inc. That said meetings with the various bureaus and agencies of the City of Tampa were essential to the client's case and also essential with reference to future inspections and permits which the client would have to obtain from the various department heads of said

agencies of the City of Tampa. Petitioner fails to consider the impact on J. B. Hooper's filing a complaint and grievance with the aforesaid agencies of the City of Tampa and the state licensing board against the license holder, Mark Ellerbee, of Suncoast Service Center, Inc.

21. Denied.

22. Anything not specifically admitted hereto, is hereby denied.

SECOND AFFIRMATIVE DEFENSE

The complainant against Respondent was J. B. Hooper and not the client as a corporation or in the individual capacity and the complainant had no standing against Respondent.

THIRD AFFIRMATIVE DEFENSE

Client hired the law law firm of Freeman and Lopez, P.A., who substituted as counsel in the cause of Suncoast Service Center, Inc., vs. J. B. Hooper and Arthur T. Jones, Case No. 83-14083, Division J, and later filed a cause of action in the County Court and said new law firm has failed to proceed to trial to recover a judgment against defendants Hooper and Jones and failed

to pursue the necessary action to recover attorney fees and costs against Hooper and Jones.

FOURTH AFFIRMATIVE DEFENSE

The court file in Case No. 83-14083, Division J, will reflect not only the complaint but the counterclaim against Suncoast Service Center, Inc. requesting both compensatory and punitive damages and further requesting a jury trial by supplemental motion. The time involved in the case was necessary both in terms of the Plaintiff's complaint and the defense to the counterclaim and the charges of $100.00 per hour was reasonable in that said hourly charge is the state's average hourly fee according to the latest Florida Bar poll.

FIFTH AFFIRMATIVE DEFENSE

Paragraph eight of the attorney/client contract states "Any attorney employed by this office is also employed by you and may represent you in your action. Costs and fees will in no way differ depending upon who the attorney is in this office ultimately representing you."

SIXTH AFFIRMATIVE DEFENSE

Paragraph one of the attorney/client contract states that the client will be billed at $100.00 per hour.

SEVENTH AFFIRMATIVE DEFENSE

Paragraph six of the attorney/client contract, the attorney is allowed to withdraw for non-payment of attorney fees and costs.

EIGHTH AFFIRMATIVE DEFENSE

In the case of Andrew J. Mirabole, P.A. vs. Suncoast Service Center, Inc., the Respondent is only exercising his constitutional right both under the United States Constitution and the State of Florida Constitution in which he seeks an appropriate forum to determine the value of his claim against a former client. The former client although represented by other legal counsel, filed no defenses to said complaint other than its general denial.

NINTH AFFIRMATIVE DEFENSE

Accord and satisfaction. Respondent and former client in the case of Andrew J. Mirabole, P.A. vs. Suncoast Service Center, Inc. has entered into an

agreement, constituting an accord and satisfaction, settling the matters of attorney's fees between the parties, which agreement is attached hereto and incorporated herein by refrence.

TENTH AFFIRMATIVE DEFENSE

Payment. Former client has paid the monetary amounts stated in the ninth affirmative defense.

WHEREFORE, Respondent having answered the complaint, together with all appropriate affirmative defenses, prays that the same be dismissed with prejudice.

I HEREBY CERTIFY that a copy of the foregoing was furnished to John Berry, Staff Counsel, The Florida Bar, Tallahassee, FL 32301, and Diane Victor Kuenzel, Suite C-49, Tampa Airport Marriott Hotel, Tampa, FL 33607, by U.S. Mail, this 9th day of October, 1985.

/s/ MICHAEL L. KINNEY
MICHAEL L. KINNEY, ESQUIRE
209 S. MacDill Ave.
Tampa, FL 33609
(813) 875-6199
Attorney for Respondent

ANDREW J. MIRABOLE, P.A.

By: /s/ ANDREW J. MIRABOLE
ANDREW J. MIRABOLE, ESQUIRE
4117 N. Armenia Ave.
Tampa, FL 33607
(813) 872=5591
Respondent

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR HILLSBOROUGH COUNTY, CIVIL ACTION

SUNCOAST SERVICE CENTER, INC., a Florida corporation,

Plaintiff,

vs.

ARTHUR T. JONES and J. B. HOOPER,

Defendants.

File No. 83-14083
Division "J"

AMENDED COUNTERCLAIM

COMES NOW, the Defendants, ARTHUR T. JONES and J. B. HOOPER, by and through their undersigned attorney, and sues Plaintiff, SUNCOAST SERVICE CENTER, INC., a Florida corporation, and alleges:

1. The Defendants/ Counterclaimants entered into a written and oral agreement with the Plaintiff/ Counterdefendant for the installation of an air conditioning system at 4711 Bay Avenue, in Tampa, Hillsborough County, Florida.

2. The system was installed in a manner contrary to good workmanship standards, and in violation of the

written and oral agreement between the parties as evidenced by the following:

a. Flexible ductwork was installed where rigid ductwork has been specified.

b. Ductwork was installed over the attic access making access difficult while risking damage to the ductwork.

c. The door covering the blower unit was installed in such a manner that it was placed against one wall instead of being centered within the space allotted.

d. The recessed area around the door was trimmed out with 3/4 inch outside panel trim molding instead of customary drywall finish.

e. Baseboard of a unique design was not replaced but rather discarded, necessitating the substitution of baseboard trim of a non-matching design.

f. The ceiling in one room was damaged so extensively by the installation of ductwork and grill that the entire ceiling had to be replaced.

g. Access holes were cut and then left uncovered with the trim removed.

h. The area around the main trunk line leading into the attic was so poorly sealed that extensive air loss was experienced and sections of the ductwork were left untaped.

3. The agreement between the parties was breached by Plaintiff/ Counterdefendant's refusal to provide TECO with proof of purchase thereby depriving Defendants/ Counterclaimants of the Energy Rebate which was due them

4. The Defendants/ Counterclaimants were fraudently induced into entering into said agreement by Plaintiff/ Counterdefendant's misleading advertisements regarding seasonal discounts in violation of Section 501.204, Florida Statutes (1981).

5. The Defendants/ Counterclaimants were intentionally misled regarding the quality and quantity of systems installed by Plaintiff/ Counterdefendant.

6. The Plaintiff/ Counterdefendant acted with malice, wantonness, wilfulness and reckless indifference to the rights of the Defendants/ Counterclaimants by filing a claim of lien with knowledge that all work had

not been completed according to the agreement between the parties.

7. The Plaintiff/ Counterdefendant acted with malice, wantonness, wilfulness and reckless indifference toward the rights of the Defendants/ Counterclaimants by filing a lawsuit to have the property sold at a judicial sale with knowledge that all work had not been completed according to the agreement between the parties.

8. The Plaintiff/ Counterdefendant acted with malice, wantonness, wilfulness and reckless indifference toward the Defendants/ Counterclaimants by filing a claim of lien prior to having the completed work inspected as required by law.

9. The Plaintiff/ Counterdefendant acted with malice, wantonness, wilfulness and reckless indifference towards the rights of the Defendants/ Counterclaimants by filing a claim of lien prior to having the completed work inspected as required by law.

10. As a direct result of Plaintiff/ Counterdefendant's breach of the written and oral agreement, their malicious actions as outlined above,

Defendants/ Counterclaimants suffered damages from the delay in the marketing and sale of the subject property, suffered injury to their reputation, experienced loss or the delay in receiving an Energy Rbate which was due them, suffered lost earnings and lost time, and incurred attorney's fees and costs.

WHEREFORE, the Defendants/ Counterclaimants demand judgment for compensatory and punitive damages against Plaintiff/ Counterdefendant, plus attorney's fees and costs and trial by jury.

I HEREBY CERTIFY that a true and correct copy of the foregoing AMENDED COUNTERCLAIM was mailed/hand-delivered to Andrew J. Mirabole, Esquire, 4117 North Armenia Avenue, Tampa, FLorida 33607, this 20th day of January, 1984.

/s/ J. B. HOOPER
J. B. HOOPER, ESQUIRE
J. B. HOOPER, P.A.
Post Office Box 1891
Tampa, Florida 33601
813/224-0994
Attorney for Defendants

ANDREW J. MIRABOLE, P.A.
4117 N. Armenia Avenue
Tampa, FL 33607
(813) 872-5591

FEE AGREEMENT AND OFFICE POLICY

The following is this office's fee agreement with you in regard to your Suit against ARTHUR T. JONES and J. B. HOOPER.

1. Retainer and Hourly Rate: This office hereby acknowledges receipt from you of $575.00 as a non-refundable, non-returnable retainer for representing you in this case. In addition, you will be billed at an hourly rate of $100.00. The retainer will be credited toward payment of future hourly charges.

2. Costs: In addition to the attorney fees cited in paragraph one, you shall also be required to pay this office in advance the costs it will incur in handling your case. Costs include, but are not limited to, court reporter's fees, witness fees, and service of process as regards subpoenas for depositions and trial.

3. Prayer for Attorney Fees and Costs: Pursuant to applicable Florida Law, this office will seek attorney fees and costs from the opposing parties. Any amount awarded by the Court will be credited to you. However, you will be responsible for those amounts still outstanding pursuant to the fee arrangement set forth in paragraphs one and two above.

4. Payment of Fees and Costs: All fees and costs should be paid up to current amount due prior to trial in the case.

5. Written Consent to Settlement: This office will not make any settlement without your written consent.

6. Right of this office to withdraw from case: This office shall have the right to withdraw from your case as your attorneys if you do not make the payments required by this Agreement, if you have misrepresented or failed to disclose material facts to us, or if you refuse to follow our advice. In any of these situations, you shall execute a Stipulation for Substitution of Counsel at our request.

7. Lien for fees: This office shall have a lien on our office file, your documents, property, or money in our possession for the payment of all sums due us from you under this Agreement.

8. Office represents client: You should know and understand that you are represented by this office and any attorney employed by this office is also employed by you and may represent you in your action. Fees and costs previously outlined above will in no way differ depending on who the attorney is in this office ultimately representing you.

9. Costs of collection: If it is necessary for this office to file suit against you for the collection of any sums due us from you under this Agreement, you shall pay us a reasonable attorney's fee together with Court costs for our efforts expended in having to collect those sums.

10. Disclaimer of guarantees: You acknowledge that we have made no guarantees whatsoever to you regarding the disposition or outcome of this matter and all expression relative to it are the opinions of this office only.

11. Non-waiver provisions: There is to be no waiver, change, or modification of this Agreement unless the same is in writing and signed by you and an attorney from our office.

12. Closing provisions: If the above correctly sets forth our agreement, please sign one (1) copy of this instrument and return it to us.

DATED at Tampa, Hillsborough County, FL this 18th day of January, 1984.

READ, APPROVED AND ACCEPTED BY:

/s/ BONNIE RODRIGUEZ
BONNIE RODRIGUEZ, President
Suncoast Service Center, Inc.

ANDREW J. MIRABOLE, P.A.

By: /s/ ANDREW J. MIRABOLE

SUPREME COURT OF FLORIDA

No. 67,693

THE FLORIDA BAR,

Complainant,

v.

ANDREW J. MIRABOLE,

Respondent.

MOTION TO REOPEN JUDGMENT

COMES NOW, the Respondent, ANDREW J. MIRABOLE, by his undersigned counsel, pursuant to Rule 1.540(b), Florida Rules of Civil Procedure, and moves for an order from this Honorable Court, reopening the judgment heretofore entered against him upon the following grounds:

1. This Court's judgment was entered on the 11th day of December, 1986, confirming the Bar Grievance Referee's recommendation for a public reprimand, a copy being appended for convenience, as Exhibit "B."

2. Respondent's Motion for Rehearing and Clarification was denied on the 5th day of January, 1987.

3. The case was heard before the referee beginning on the 9th day of January, 1986 and ending on the 17th day of June, 1986. The referee filed his report in this Court on the 23rd day of June, 1986.

5. During those proceedings it now appears that Bar proceedings involving the same matter were being conducted against the very attorney that had filed the complaint against the Respondent, but were not revealed to the referee, to Respondent, or to this Court.

6. Those proceedings were apparently instituted by the Bar's witness, Bonnie Rodriquez, the alleged victim but not complainant in the Respondent's case, clearly indicating the attorney she thought was responsible for the mistreatment accorded her was not the Respondent.

7. A copy of an article in The Tampa Tribune, Saturday, August 16, 1986, is appended as Exhibit "A", indicating that the proceedings involved the very same factual situation out of which arose the proceedings against this Respondent and were exculpatory as to him.

8. These proceedings should have, in fact, but were not, revealed by the Bar to Respondent and his counsel, and as shown in pages 44-45 of the transcript of the proceedings before the referree in this case, were actually concealed by the Florida Bar. (TT 44-45, 123)

9. The 1986 Florida Bar Rules of Professional Conduct, Rule 4-3.4 provides in pertinent part:

> 4-3.4. Fairness of Opposing Party and Counsel. A lawyer shall not:
> (a). . . conceal a document or other material that a lawyer knows or reasonably should know is relevent to a pending. . .proceeding. (Emphasis supplied)

10. The Bar knew that skilled counsel employed by Petitioner would be substantially more persuasive if able to argue that the client's complaint was directed at the debtor-attorney because she, with the most knowledge of all the circumstances and acumen for business, had discerned that the size of the fees were caused by the obduracy of her opposing party and that Petitioner was without fault.

11. Disciplinary proceedings against a lawyer have been held to be quasi-criminal. See Re Ruffalo, 390 U.S. 544, 20 L.Ed 2d 117, 88 S.Ct. 1222 (1968). Thus, the principles of Brady v. Maryland, 373 U.S. 83, should apply and therefore the constitutional requirement that a government prosecutor inform the defendant of exculpatory evidence is applicable to the government bar prosecutor.

The judgment should be set aside and the proceeding referred to a new referee untainted by hearing the case under the circumstances caused by the concealment.

Respectfully submitted,

/s/ MICHAEL L. KINNEY
Michael L. Kinney
208 South MacDill Avenue
Tampa, Florida 33609
813/875-6199

Attorney for the Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished to John T. Berry, Esq., The Florida Bar, Tallahassee, Florida 32302, and Diane Victor Kuenzel, The Florida Bar, Suite C-49, Tampa Airport Marriott Hotel, Tampa, Florida 33607, by U.S. Mail, postage prepaid, this 6th day of April, 1986.

/s/ MICHAEL L. KINNEY
Michael L. Kinney

EXCERPT FROM THE TAMPA TRIBUNE, SATURDAY, AUGUST 16, 1986.

JUDICIAL CANDIDATE CALLS ETHICS CHAERGES 'POLITICALLY MOTIVATED'

A referree for the Florida Bar Association has recommended that Tampa attorney J. B. Hooper be suspended for three months.

by: Jim Sloan
Tribune Staff Writer

A candidate for Hillsborough circuit judge claimed Friday that Florida Bar Association charges that he violated professional ethics are "politically motivated."

Tampa attorney, J. B. Hooper, who said he has in turn filed misconduct charges against the bar, said he will "absolutely" not withdraw from the campaign.

A bar referee ruled in June that Hooper violated five sections of the bar's Code of Professional Responsibility.

The charges stem from a suit filed against Hooper by Suncoast Service Center in Tampa after Hooper refused to pay for installation of air conditioning and heating equipment.

The suit was settled in February. Before that, however, Bonnie Rodriguez, president of Suncoast, filed a complaint with the bar charging Hooper with improper conduct.

Pinellas County Circuit Judge Gerard O'Brien, acting as referee, later ruled that Hooper violated the bar's code by:

- Failing to appear at a deposition with Suncoast.

- Communicating with Suncoast employees rather than the company's attorney.

- Misrepesenting himself as a Suncoast representative to Tampa Electric Co. to get a rebate the company offers to homeowners who install energy-saving equipment.

- Mailing a sarcastic thank you note to Suncoast's attorney, allegedly in an effort to gloat, after the Circuit Court dismissed a part of Suncoast's case.

- Trying to get Rodriguez to dismiss her ethics complaint with the bar.

O'Brien's findings and his recommendation that Hooper be suspended from the bar for three months will be considered by the Florida Supreme Court Sept. 27.

Hooper said Friday he refused to pay Suncoast's $3,021 bill for the air conditioning and heating equipment because of what he called poor workmanship and modifications to the electrical system that he claimed created fire hazards.

He said he did not appear at the Suncoast deposition because he was not subpoenaed, and that he was only following Tampa Electric Co.'s directions when he applied for the rebate.

Allegations that he represented himself as a Suncoast employee are "absolute nonsense," he said and no witness has been produced to confirm that charge.

Hooper also said it was not an ethical violation for him to telephone a "low-level" Suncoast employee, but only to communicate with the principal of the firm.

Neither was it against ethical rules for him to try to get Rodriguez to drop her complaint, he said.

His thank-you letter to Suncoast's attorney, while admittedly written "in a moment of bad judgment" was "blown out of proportion," Hooper said.

"I don't see what that has to do with an attorney's qualifications to practice law," he said.

Hooper said he will file a petition with the Florida Supreme Court alleging 15 counts of misconduct on the part of the bar.

The petition, he said, alleges that the bar, among other things:

- Engaged in private communication with the bar referee, and sought favor with the referee.

- Knowingly used false testimony against him. Rodriguez, Hooper said, testified at the misconduct hearing that she had a permit for the installation of the air conditioning and heating equipment before and during the job, and that the installation was not tagged by the city of Tampa for electrical code violations. The bar, Hooper alleged, knew both of those statements were false.

"The bar failed to prove by independent or competent evidence a single violation of any ethiccal rule," he said.

Bar officials, Hooper said, had indicated to him throughout the hearing process that the matter was to be kept confidential, but then chose to make the referee's findings public two weeks before the Sept. 2 judicial election.

"I don't think there's any question about it being politically motivated," he said.

Jan Wichrowski, who represented the bar at Hooper's misconduct hearing, said the referee found the

evidence against Hooper "clear and convincing."

She said the bar denied Hooper's allegations, and suggested that if he had proof of bar misconduct he report it to the proper authorities.

The bar, she said, will file an answer to Hooper's petition "if there really is one (a petition)."